

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

---

STEPHEN BRIGGS

v.

NEW YORK MERCANTILE EXCHANGE

---

:  
:  
:  
:  
:  
:  
:

CFTC Docket No. 98-E-2

OPINION AND ORDER

Stephen Briggs (“Briggs”) appeals from a decision by the New York Mercantile Exchange (“NYMEX”) that found him liable for trade practice and recordkeeping violations and imposed a permanent prohibition from trading for customers, a one-year suspension of his membership privileges, and a \$100,000 fine.<sup>1</sup> Briggs raises a variety of procedural and substantive challenges to NYMEX’s disciplinary action and contends that the sanctions NYMEX imposed are disproportionate to the gravity of the conduct at issue. NYMEX opposes the appeal and urges the Commission to affirm all aspects of its decision.

As explained below, we find that NYMEX’s liability findings and sanctions analysis are legally sound and supported by substantial evidence. The record, however, shows that NYMEX employed procedures that fell short of the standards imposed in the Commission’s Part 8 Rules. Nevertheless, because Briggs either waived any objection to these errors or failed to show that they prejudiced him, we affirm the result of NYMEX’s decision.

---

<sup>1</sup> Briggs’s misconduct took place on the Commodity Exchange, Inc. (“COMEX”). COMEX’s Business Conduct Committee issued the complaint against Briggs and a panel of COMEX’s Adjudication Committee (the “Adjudication Panel”) heard the evidence and issued a decision resolving liability and sanctions issues. While the proceeding was pending, COMEX became a subsidiary of NYMEX. Consequently, Briggs’s appeal was heard and resolved by a panel of the NYMEX Appeals Committee (the “Appeals Panel”). As a matter of simplicity, we refer to the proceeding as a whole as the NYMEX proceeding.

## BACKGROUND

### I.

COMEX's Business Conduct Committee issued a twenty-one count complaint against Briggs and others in June 1994.<sup>2</sup> Twenty counts involved trading sequences that Briggs participated in on ten different days between June 9, 1993 and September 17, 1993. The complaint alleged that 16 of the sequences involved non-competitive trading by Briggs, ten involved prohibited cross trading, and seven involved Briggs trading ahead of a customer order. The complaint also alleged that Briggs had improperly withheld or disclosed customer orders, improperly paired separate orders for execution as a spread trade, and failed to comply with COMEX recordkeeping requirements relating to trading cards and cross trading.

At various points during this proceeding, COMEX's Compliance Department ("Compliance") produced documents for examination by Briggs's counsel.<sup>3</sup> The record does not clearly establish the extent of Compliance's production.<sup>4</sup> The parties agree, however, that Compliance never produced the July 9, 1993 trade surveillance report that triggered the investigation of the trade sequences included in the complaint.<sup>5</sup> It is also clear that Compliance

---

<sup>2</sup> The complaint also named Matthew Brockman, Eric Zuccarelli, and Kevin McCormac as respondents. These co-respondents settled with NYMEX after the complaint was issued. Brockman agreed to a \$15,000 fine and a one-week suspension from trading. McCormac agreed to a \$2,000 fine. Zuccarelli agreed to a \$25,000 fine and a four-week suspension from trading. He also agreed that he would pay an additional \$25,000 if he committed similar violations in the future.

<sup>3</sup> Commission Rule 8.17 states that prior to an exchange disciplinary hearing, a respondent is entitled to examine "all books, documents, or other tangible evidence in the possession or under the control of the exchange which are to be relied upon . . . in presenting the charges or which are relevant to the charges." 17 C.F.R. §8.17(a)(2).

<sup>4</sup> The hearing transcript suggests, but does not clearly establish, that several months prior to the hearing, Compliance produced many or all of the records included in Exhibit 3 of the record on appeal. (Tr. at 10.) The record indicates that Compliance produced other information at the hearing or after the hearing.

<sup>5</sup> The record indicates that this report identified cleared trades where a broker executed two trades opposite the same trader and one trade was for an account of the broker's customer and the other was on the other side of the market and for the broker's account. (Tr. at 41.) The information contained in this report was drawn from the daily brokerage recap, or "clearing sheet." The latter document reflected all of the cleared trades executed by a particular broker on a particular day. (Tr. at 45.)

did not produce the investigation report considered by the Business Conduct Committee when it issued the complaint until after the hearing.<sup>6</sup> As to the trade surveillance report, Compliance claimed that production was not possible because the report had been lost. (Tr. at 478.) At the time of the hearing, Compliance claimed that it was not required to produce the investigation report.<sup>7</sup>

The Adjudication Panel conducted the hearing on November 9 and 16, 1995 and February 20 and 22, 1996.<sup>8</sup> After the first hearing session, Briggs's counsel requested that the transcript of that day's proceedings be made available "as soon as possible." (Tr. at 164.) The transcript was delivered to counsel for the Adjudication Panel ("Panel counsel") on the morning of November 16, 1995. Upon receipt, Panel counsel initiated a conversation with Compliance counsel about the distribution of the transcript. Compliance counsel advised Panel counsel that the transcript should be made available to both parties at the same time. (Tr. at 165.) Panel counsel then consulted with the Chairman of the Adjudication Panel due to some concern that the transcript not be made available to witnesses that had not yet had an opportunity to testify. (Tr. at 166.) After counsel for both sides presented argument on the issue at the beginning of the November 16, 1995 hearing session, Panel counsel provided the transcript to both Briggs's counsel and Compliance counsel.

---

<sup>6</sup> Commission Rule 8.07 requires exchanges to prepare investigation reports as part of their compliance obligations.

<sup>7</sup> The record indicates that Compliance provided the investigation report to Briggs's counsel while his appeal was pending before NYMEX. It does not, however, provide a rationale for this apparent change in Compliance's position regarding its production obligations.

<sup>8</sup> The record indicates that the third hearing session was initially scheduled for December 20, 1995. (Tr. at 334.) The Adjudication Panel initially delayed the third session until January 9, 1996 after Briggs's counsel sought a postponement. (Tr. at 470.) It then delayed the third session until February 20, 1996 due to a snowstorm and the unavailability of an ill witness. (Tr. at 471.)

The transcripts of the hearing indicate that the membership of the Adjudication Panel changed during the course of the hearing sessions. The transcripts for the November 9 and 16, 1995 hearing sessions show that Michael R. Schaefer was a member of the Adjudication Panel. (Tr. at 3 & 162.) The transcripts of the February 20 and 22, 1996 sessions show that Michael Moore was a member of the Adjudication Panel. Only the Chairman of the Adjudication Panel signed its March 19, 1997 decision (the “Adjudication Panel Decision”). The decision lists Michael Moore as a member of the Adjudication Panel and does not mention Michael R. Schaefer.

## II.

Compliance primarily relied on documentary evidence as proof of the complaint’s allegations. Documents submitted by Compliance included Briggs’s trading cards, the trading cards used by the traders who participated in the challenged trading sequences, customer order tickets related to the trades included in the challenged trading sequences, and the COMEX price change register for copper futures for the ten days at issue.

Compliance used the testimony of Russell Cloughen (“Cloughen”), manager of the trade practice investigations unit, to describe the significant information in these documents. Compliance did not attempt to qualify Cloughen as an expert and did not argue that the Adjudication Panel should accord his opinions the weight attributable to an expert.<sup>9</sup>

---

<sup>9</sup> Over Briggs’s counsel’s objection that Cloughen had not been qualified as a handwriting expert, the Chairman of the Adjudication Panel permitted Cloughen to offer his opinion about the meaning of markings on various trading records.

In addition to discussing Compliance's documentary evidence, Cloughen testified about statements that Briggs and the other participants in the challenged trade sequences made during interviews with Compliance personnel during the course of the investigation.

Briggs's attorney objected to the documentary evidence submitted by Compliance, arguing that Compliance did not lay a proper foundation under the business records exception to the evidentiary rule prohibiting the introduction of hearsay evidence. The Chairman of the Adjudication Panel ruled that these documents were admissible because they were required by the exchange, were requested in the ordinary course of business, and were regularly used by the Compliance department in its investigations. The Chairman also permitted Cloughen to testify about statements made to him during the course of the investigation.

Compliance also presented the testimony of Brockman, Zuccarelli, McCormac, Michael Forlenza, and Victor Tartaglione, a supervisor of the ring reporters in the copper pit during the period at issue, in support of its case. Brockman's, Forlenza's, and McCormac's testimony provided limited support for Compliance's case. Zuccarelli's testimony substantially supported Compliance's case, but he admitted that he would lie whenever and however necessary to help himself. (Tr. at 435.) Tartaglione testified that he did not really recall the circumstances of the trading sequence for which he was called to testify. (Tr. at 348-49.)<sup>10</sup> He acknowledged,

---

<sup>10</sup> Tartaglione approved a trading slip that Briggs submitted in order to have an allegedly missed price inserted in the COMEX Price Change Register. The inserted price played a role in the allegations relating to trade sequence three.

however, that one of the words he wrote on a trading slip generally indicated that “he heard [the price of a trade] and it is not on the board.” (Tr. at 349-50.)

Briggs testified on his own behalf. His testimony described the harm that he had suffered as a result of the issuance of the complaint. He also explained his theory that he was targeted in the complaint due to his failure to aid Compliance in a separate case that Compliance had lost. Finally, he emphasized that the charges involved small dollar amounts and technical violations that did not harm his customers. (Tr. at 534-35.)

### III.

On March 19, 1997, the Adjudication Panel issued its decision finding Briggs liable for 15 non-competitive trades, ten prohibited cross trades, six instances of trading ahead of his customers, and numerous recordkeeping violations. The Adjudication Panel dismissed two of the complaint’s 20 counts against Briggs in their entirety and partially dismissed three other counts. As sanctions, the Adjudication Panel imposed a permanent prohibition from trading for customers, a one-year suspension of membership privileges, and a \$100,000 fine.

Most of the Adjudication Panel’s decision reflected its review of the documentary evidence and the inferences that the Panel drew from this evidence. While the Adjudication Panel endorsed Cloughen’s testimony as credible, Adjudication Panel Decision at 7, it rarely cited to Cloughen’s testimony in describing the inferences it drew from the documentary evidence. The Panel did not make express credibility determinations about the other witnesses. It did note that “great weight” was not given to Zuccarelli’s testimony, Adjudication Panel Decision at 14, n. 20, and that Briggs’s testimony that the COMEX Vice President who formerly supervised compliance “had it in for him” was not credible, Adjudication Panel Decision at 7.

#### IV.

Briggs filed a timely appeal with the NYMEX Appeals Committee. In May 1997, NYMEX served the parties with a notice disclosing the members who would serve on the Appeals Panel for Briggs's appeal. Due to recusal requests filed by two of the assigned members, in June 1997 NYMEX served the parties with a second notice disclosing a revised list of members who would serve on the Appeals Panel.

Briggs's counsel filed a written request that John Moore be removed from the Appeals Panel and, several days later, filed a written request that Norman Arnoff and Dennis Vassallo be removed from the Panel. Compliance then filed an untimely written request to remove John Moore and Nicholas Mercurio from the Appeals Panel. In this submission, Compliance acknowledged that it had given oral notice of its panel member objections to NYMEX's Office of General Counsel "immediately upon receipt of the notice of revised panel assignment." Record Exhibit 29.

On July 8, 1997 NYMEX granted Briggs's request to remove John Moore<sup>11</sup> but denied his request to remove Norman Arnoff and Dennis Vassallo. The order denied Compliance's request to remove Nicholas Mercurio as untimely, but noted and granted Mercurio's request that he be recused. As a consequence of this order, a panel composed of Thomas Vitiello, Norman Arnoff, and Dennis Vassallo heard Briggs's appeal.<sup>12</sup>

---

<sup>11</sup> The order indicated that Moore also requested recusal.

<sup>12</sup> During this period, it was also discovered that Exhibit 22 (the "Forlenza letter") – a letter to Michael Forlenza from the COMEX Business Conduct Committee informing him that charges might be brought against him – was missing from the record and could not be located.

V.

On appeal, Briggs claimed that the proceeding before the Adjudication Panel was procedurally flawed.<sup>13</sup> In this regard, Briggs argued that he was denied a fair hearing because he: (1) did not receive documents relevant to the charges against him prior to the hearing<sup>14</sup> and (2) did not have sufficient time to prepare to cross-examine Cloughen due to counsel's delayed receipt of the transcript of the first hearing session. Briggs also argued that the long passage of time between the date the complaint was filed and the date of the Adjudication Panel's decision denied him fundamental fairness,<sup>15</sup> and that he was prejudiced by *ex parte* contacts between counsel for Compliance and exchange decisional employees.

Briggs also challenged the composition and conduct of the Adjudication Panel. First, he claimed that Michael Moore should have recused himself due to a financial interest in the

---

<sup>13</sup> Briggs's counsel couched most of his procedural arguments in terms of violations of the United States Constitution. The proper basis for these arguments is Commission Rule 8.17(a), which guarantees certain procedural protections and recognizes that respondents in exchange disciplinary proceedings have a right to a fair hearing. *See also*, Commission Rule 9.33(c) (indicating that the Commission reviews exchange disciplinary actions to determine whether "[f]undamental fairness was observed in the conduct of the proceeding"). Counsel's erroneous reliance on inapplicable constitutional provisions does not play a material role in our analysis.

<sup>14</sup> Specifically, Briggs complained that he did not receive either the July 9, 1993 trade surveillance report that triggered the investigation of the trade sequences included in the complaint or the investigation report considered by the Business Conduct Committee when it issued the complaint.

<sup>15</sup> Briggs cited to three periods of delay in support of his argument. First, he noted that the first session of the hearing was conducted 17 months after the complaint was issued. In this regard, he emphasized that Forlenza, McCormac, and Zuccarelli were unable to recall many of the circumstances material to the trade sequences at issue in the complaint. He also noted that there was a three-month gap between the second and third hearing sessions and claimed that this delay was responsible for his counsel's inability to recall Cloughen's testimony during cross-examination of that witness. Finally, Briggs noted that over a year had passed between the conclusion of the hearing and the date the Adjudication Panel issued its decision.



matter.<sup>16</sup> Second, he argued that he was denied fundamental fairness because the members of the Adjudication Panel who decided the case were not present for all portions of each hearing session. Specifically, he claimed that Panel members Helmid and Siotti were absent for a portion of the initial session and that Michael Moore did not attend the first two sessions.

Briggs's substantive challenges focused on the Adjudication Panel's credibility determinations and factual assessments. As to credibility, Briggs argued that the Panel erred by failing to completely discount Zuccarelli's testimony given his admission that he would readily lie to promote his self-interest and by not crediting the testimony of some of the witnesses. In addition, Briggs claimed that there was no basis for disregarding Tartaglione's testimony that he heard the price of one of the challenged trades in the third trade sequence called out in the copper pit.

Briggs also challenged the weight that the Adjudication Panel accorded to Compliance's documentary evidence and Cloughen's explanation of the documents. Briggs argued that the documentary evidence amounted to unreliable hearsay because the records "did not fall within the purview of the business records exception." Briggs's Appeal Brief at 42. He criticized many of the trading documents as "double hearsay," claimed that the markings on the trading cards were easily misunderstood, and emphasized that Cloughen lacked personal knowledge of the information that the various traders recorded. He also contended that the Adjudication Panel erred by failing to require that Cloughen be qualified as an expert, permitting Cloughen to read

---

<sup>16</sup> Commission Rule 8.17(a)(2) provides that "no member of a disciplinary committee may serve on a panel if he or any person or firm with which he is affiliated has a financial, personal or other direct interest in the matter under consideration." Briggs claimed that Michael Moore had a financial interest through his partnership with John Moore and that John Moore had a financial interest because he regularly traded with Briggs in the copper pit and was in competition with Briggs. Briggs also noted that John Moore had served as the Chairman of the Business Conduct Committee that issued the complaint and alleged that he was a good friend of the COMEX Vice President responsible for Compliance.

into the record notes and files, and considering Cloughen's testimony about statements other witnesses made during the course of Compliance's investigation.

Finally, Briggs argued that the sanctions imposed by the Adjudication Panel were unduly severe and inadequately explained. In this regard, he emphasized that he earned minimal profits from the challenged trade sequences, there was no harm to the general public, and lesser sanctions were imposed on other participants. He also reiterated his claim that he was the victim of discriminatory targeting by Compliance.

## VI.

On April 23, 1998, the Appeals Panel issued a decision that affirmed the Adjudication Panel's choice of sanctions along with most of its findings of fact and conclusions of law.<sup>17</sup> The Appeals Panel vacated the Adjudication Panel's conclusion relating to trade sequence nine, however, because the evidence was insufficient.<sup>18</sup>

The Appeals Panel rejected many of Briggs's procedural challenges as untimely and thus waived. For example, the Appeals Panel noted that Briggs's counsel had failed to object when the Chairman of the Adjudication Panel commenced the first hearing session while two Panel members were absent, or when Michael Moore replaced Michael Schaefer on the Adjudication Panel. It also noted that Briggs's counsel failed to raise before the Adjudication Panel the claim that Michael Moore was possibly subject to a disqualifying financial interest, and failed to object

---

<sup>17</sup> The Appeals Panel stated that it conducted almost three hours of oral argument on December 1, 1997. For reasons not explained on the record, a transcript of that oral argument was not submitted by NYMEX. While this omission is incompatible with NYMEX's obligation to file the "record of the exchange proceeding" described in Commission Rule 9.2(i), we find that Briggs waived any objection to this error by failing to raise any challenge to the omission.

<sup>18</sup> The Appeals Panel concluded that the evidence indicating that Briggs had recorded the charged trade on his trading card and that McCormac had not was insufficient to support a conclusion that the trade was executed non-competitively. The Appeals Panel characterized the testimony interpreting this audit irregularity as "less convincing and more speculative" than evidence put forth in other trade sequences and noted that the Adjudication Panel's finding regarding McCormac's presence in the copper pit during the trade was not supported by the evidence in the record. Appeals Panel Decision at 24.

to either the delay between the date the complaint was issued and the date the hearing was held, or the delay between the completion of the hearing and the Adjudication Panel Decision.

The Appeals Panel also rejected some of these procedural challenges on the merits. As to Michael Moore's alleged disqualifying financial interest, the Appeals Panel ruled that Briggs did not establish that it existed and that, even if it had, the interest was "too remote and tangential to require recusal." Appeals Panel Decision at 46, n. 27. As to Michael Moore's failure to attend the first two sessions, the Appeals Panel essentially found that the error was harmless. It reasoned that COMEX Rule 8.40 allowed the Adjudication Panel to resolve issues by a majority vote and that, even without Moore's vote, there was a five-vote majority to support the Adjudication Panel Decision. On this basis, the Appeals Panel concluded that the error was not "outcome determinative." Appeals Panel Decision at 46.<sup>19</sup>

The Appeals Panel concluded that the delay between the date the complaint was issued and the date of the hearing did not amount to a denial of a fair hearing. The Panel reasoned that the 17-month delay was not inordinate in view of the number of trade sequences at issue and the necessity of staffing the hearing panel with exchange members. Appeals Panel Decision at 47-48. In addition, the Appeals Panel indirectly acknowledged that the delay in the hearing violated COMEX requirements, but concluded that Briggs did not establish that the violation "prejudiced the result below." Appeals Panel Decision at 67. In this regard, it emphasized that the documentary evidence was the key to most of the Adjudication Panel's findings and that the interviews Compliance conducted with the participants in the challenged trading sequences

---

<sup>19</sup> The Appeals Panel did not address the merits of Briggs's argument about the absence of Panel members Siotti and Helmid from a portion of the first hearing session.

effectively memorialized their recollections. Appeals Panel Decision at 48.<sup>20</sup>

The Appeals Panel acknowledged that the three-month delay between the second and third hearing sessions violated COMEX Rule 8.37(c).<sup>21</sup> Once again, however, the Panel ruled that Briggs failed to show that the error prejudiced him. It noted that Briggs's counsel had requested a postponement during the relevant period and that counsel could have used a transcript of Cloughen's testimony to prepare for his cross-examination in February 1996. Appeals Panel Decision at 58.

The Appeals Panel concluded that the November 16, 1995 conversation between Panel counsel and Compliance counsel about the transcript of the first hearing session did not amount to an *ex parte* contact under NYMEX rules because it involved a procedural matter.<sup>22</sup> The Appeals Panel concluded that the June 1997 conversation between Compliance counsel and an attorney in the NYMEX Office of General Counsel regarding the membership of the Appeals Panel did amount to a prohibited *ex parte* communication, but that Briggs failed to show that he was prejudiced by the conversation. In this regard, the Panel noted that the two members challenged by Compliance recused themselves, and that Briggs did not claim that the members appointed to replace them were biased against him. Appeals Panel Decision at 54-55.

Finally, the Appeals Panel held that Compliance's failure to produce the July 9, 1993 trade surveillance report and Compliance's Investigation Report did not deprive Briggs of a fair

---

<sup>20</sup> The Appeals Panel also noted that Briggs's counsel did not attempt to interview expected witnesses between the date the complaint was issued and the commencement of the hearing. *Id.*

<sup>21</sup> That rule prohibits hearing adjournments that exceed 30 days.

<sup>22</sup> Appeals Panel Decision at 52. The Appeals Panel did not explain why it sought guidance from NYMEX rules when the conduct took place during a time period when COMEX rules applied. The Appeals Panel noted that no prejudice arose from the alleged delay in delivering the transcript to Briggs's counsel. In this regard, the Panel emphasized that counsel received the transcript in November 1995 and did not cross-examine the witness at issue (Cloughen) until February 1996. In addition, the Appeals Panel noted that Briggs's counsel could have arranged to receive the transcript directly from the reporter.

hearing. As to the former, the Panel emphasized that the Adjudication Panel's findings were "based on the contemporaneous records which were available to Briggs" rather than the July 9, 1993 surveillance report. Appeals Panel Decision at 63. The Appeals Panel also held that production of the investigation report "is not necessary to enable a respondent to proceed," as opposed to the "evidence upon which the report is based." Appeals Panel Decision at 62. Noting that the investigation report includes Compliance's confidential "work product," the Panel concluded that there was no requirement that such a report be shared with Briggs. *Id.* Finally, the Appeals Panel concluded that the absence of the Forlenza letter<sup>23</sup> from the record did not prejudice Briggs because the contents of the exhibit were not material to the Adjudication Panel's determinations and had only a tangential relationship to Briggs or his conduct. Appeals Panel Decision at 64.<sup>24</sup>

The Appeals Panel rejected Briggs's challenges to the Adjudication Panel's credibility determinations because, in its view, credibility determinations "are for the trier of fact, not an appellate panel to make." Appeals Panels Decision at 69.<sup>25</sup> It also noted, however, that the Adjudication Panel's positive credibility finding as to Cloughen was only of "marginal" significance "since he was essentially an interpretive, not a fact witness." Appeals Panel Decision at 70. Moreover, when the Appeals Panel reviewed the evidence material to each of the

---

<sup>23</sup> See note 12 above.

<sup>24</sup> The Appeals Panel also ruled that COMEX was not required to advise Briggs that he had a right to counsel prior to interviewing him for purposes of its investigation. The Panel held that the NYMEX rule requiring such notice did not apply to a COMEX investigation. Appeals Panel Decision at 49.

<sup>25</sup> In support, the Panel noted that the trier of fact has seen and heard the witnesses and is in a position to evaluate their demeanor. *Id.* Notwithstanding this deferential review, the Appeals Panel did discuss witness credibility in several footnotes. See, e.g., Appeals Panel Decision at 16, n. 7 (discussing Tartaglione's testimony regarding trade sequence 3).

challenged trading sequences, it emphasized that the Adjudication Panel's determinations were based largely on the documentary evidence.

The Appeals Panel rejected Briggs's hearsay challenge to the weight accorded the documentary evidence because the Adjudication Panel was not bound by rules of evidence precluding the admission of hearsay statements. Appeals Panel Decision at 71-72. Nevertheless, the Appeals Panel also evaluated the challenge in light of the Federal Rules of Evidence and concluded that the documents at issue were admissible under either the exception for business records or the exception for admissions by a party opponent. Appeals Panel Decision at 73-75.<sup>26</sup>

The Appeals Panel ruled that NYMEX Rule 8.19(B) limited its review of the Adjudication Panel's factual determinations to whether a finding was supported by "any evidence in the record of the proceeding." Appeals Panel Decision at 65. Nevertheless, in affirming the bulk of the Adjudication Panel's factual determinations, the Appeals Panel reviewed the record in detail and provided a rationale for resolving many evidentiary conflicts. *See, e.g.*, Appeals Panel Decision at 21, n. 10. The Appeals Panel noted that the Commission has confirmed that circumstantial evidence is sufficient to prove trade practice allegations. Appeals Panel Decision at 68-69.

The Appeals Panel also concluded that there was no basis for disturbing the sanctions imposed by the Adjudication Panel. The Appeals Panel found that COMEX Rule 8.15(c)

---

<sup>26</sup> In this regard the Appeals Panel emphasized that:

The traders' cards and the Exchange's Time and Sales Requests, Daily Brokerage Recaps, Daily Markets Report and Cleared Trade Report were and are admittedly made contemporaneously and in the regular course of the Exchange's business or the trader's business. Indeed, CFTC Regulations and NYMEX and former COMEX rules required that such contemporaneous records be kept . . . *See, e.g.*, former COMEX Rule 4.24(b), (c) and (d), 4.42(f), 4.46(f), 4.61, 4.80, 4.81, 4.83, 4.90 and 4.97.

Appeals Panel Decision at 75 (footnote omitted).

provided Briggs adequate notice of the range of sanctions to which he might be subject. Appeals Panel Decision 55-56. It concluded that Briggs's violations were serious because non-competitive trading threatens public confidence in the market place as well as the "reputation, prospects and other best interests of the Exchange and its members." Appeals Panel Decision at 78. The Appeals Panel also characterized Briggs's violations as "repetitive, serious wrongdoing of a calculated and intentional nature," and, in some instances, committed with "utter disregard for the welfare and rights of customers." Appeals Panel Decision at 59. The Panel concluded that the absence of evidence that substantial profits flowed directly from the wrongdoing did not significantly mitigate the seriousness of the violations. Appeals Panel Decision at 78.<sup>27</sup>

## VII.

NYMEX served Briggs with a copy of the Appeals Panel Decision on or about April 28, 1998. On May 11, 1998, Briggs filed a notice of appeal and a petition for a stay pending appeal with the Commission. On May 22, 1998, the Commission issued an order denying the motion for a stay. *In re Briggs*, CFTC Docket No. 98-E-2 (CFTC May 22, 1998). When the Commission's Office of Proceedings did not receive a brief from Briggs within 30 days of the date that NYMEX filed the record of its proceeding, the Commission dismissed the appeal as unperfected. *Briggs v. New York Mercantile Exchange*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,512 (CFTC Order Pursuant to Delegated Authority) (CFTC Jan. 7, 1999).

In May 1999, the Commission received a letter from Briggs inquiring about the status of his appeal. Briggs included a June 25, 1998 letter indicating that he was submitting the briefs that he filed before NYMEX as his appellate brief with the Commission. On July 21, 1999, the

---

<sup>27</sup> The Panel also noted that the sanctions left Briggs free to trade for his own account once the period of suspension was served. Appeals Panel Decision at 78.

Commission vacated the order dismissing Briggs's appeal and granted Briggs's request that his appellate briefs in the NYMEX appeal constitute his appellate briefs before the Commission. *Briggs v. New York Mercantile Exchange*, CFTC Docket No. 98-E-2 (CFTC July 21, 1999). In August 1999, NYMEX filed an answering brief that essentially reiterated the points made in the Appeals Panel decision.

## DISCUSSION

### I.

Commission Rule 9.33 establishes the standards applicable to the review of exchange disciplinary actions.<sup>28</sup> They include whether: (1) the action was taken in accordance with the rules of the exchange; (2) fundamental fairness was observed in the conduct of the proceeding; (3) the record contains substantial evidence of a violation of the rules of the exchange; and (4) the action conforms to the Commission's rules, regulations, and orders.

As to factual issues, Commission precedent indicates that the weighing of credibility disputes is "normally for the exchange," *In re Malato*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,084 at 34,707 (CFTC Dec. 22, 1987), *vacated and remanded on other grounds*, *Board of Trade of the City of Chicago v. CFTC*, 724 F. Supp. 548 (N.D. Ill. 1989), and that evidence supporting an exchange's factual conclusions is "substantial" when a reasonable mind might accept it as adequate. *In re Clark*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,370 at 46,692 (CFTC July 22, 1998).<sup>29</sup> As to procedural errors, Commission

---

<sup>28</sup> The Commission's statutory authority to review exchange disciplinary actions is found in Section 8c(b) of the Commodity Exchange Act (the "Act"). Section 8c(c) provides that the Commission may "affirm, modify, set aside, or remand any exchange decision after an on the record determination of whether the action of the exchange was in accordance with the policies of the Act."

<sup>29</sup> In making this determination, the Commission considers the record as a whole. *Siegel v. Chicago Board of Trade*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,983 at 37,612 (CFTC January 9, 1991).



precedent holds that the appealing party has the burden of showing that the error at issue was prejudicial. *Id.* at 46,696.

## II.

As noted above, Briggs claims that the NYMEX proceeding was marred by a variety of procedural errors. We summarily reject three of these claims as unsupported by the record.<sup>30</sup> We summarily reject six others due to Briggs's failure to demonstrate that the alleged errors were prejudicial.<sup>31</sup>

Two of the procedural errors cited by Briggs warrant fuller discussion. The record supports the Appeals Panel's findings that: (1) the membership of the Adjudication Panel changed after the second hearing session, and (2) Michael Moore, who was present for the final two hearing sessions, participated in the Adjudication Panel's resolution of the issues material to Briggs's liability and sanctions.<sup>32</sup> Briggs claims that Moore's participation was improper because he failed to attend the first two hearing sessions.

---

<sup>30</sup> These include: (1) Briggs's allegation that Michael Moore had a disqualifying financial interest within the meaning of Commission Rule 8.17(a)(1); (2) Briggs's claim that Panel counsel's November 1995 discussion of the transcript of the first hearing session with Compliance counsel amounted to a prohibited *ex parte* communication within the meaning of NYMEX Rule 8.20; and (3) Briggs's claim that COMEX investigators had a duty to advise Briggs of his right to retain counsel prior to commencing any interview.

<sup>31</sup> These include Briggs's arguments relating to NYMEX's: (1) failure to commence the hearing within 120 days of the complaint as required by COMEX Rule 8.37; (2) adjournment of the disciplinary hearing for a period longer than the 30 days authorized by COMEX Rule 8.37; (3) one-half day delay in supplying the transcript from the first hearing session to Briggs's counsel; (4) failure to comply with Commission Rule 8.18's requirement for a prompt written decision following the completion of the hearing; (5) commencement of the first hearing session without two members of the Adjudication Panel; and (6) failure to prevent Compliance counsel from using an *ex parte* communication to raise objections to the membership of the Appeals Panel.

<sup>32</sup> The record does not disclose COMEX's rationale for substituting panel member Moore for panel member Schaefer. We recognize that, as a practical matter, such substitutions may be unavoidable in limited circumstances. In the future, we expect that the particular circumstances justifying a substitution will be clearly described on the record.

Our precedent recognizes that attendance at all hearing sessions is not a prerequisite for a Panel member's participation in deliberations. Indeed, in somewhat similar circumstances we specifically noted that "there is no reason why members who read the record may not participate in the decision notwithstanding some absence from the hearing." *Malato*, ¶ 24,084 at 34,704 n.6. Given the lengthy period that passed between the close of the hearing and the issuance of the Adjudication Panel's decision, Moore had more than adequate time to obtain the transcripts of the first two hearing sessions and review the testimony. Moreover, as discussed below, both the Adjudication Panel and the Appeals Panel primarily based their determinations on documentary evidence that was available to Moore. Given these circumstances, we conclude that Moore's participation in the Adjudication Panel's deliberations did not deny Briggs fundamental fairness.<sup>33</sup>

In the alternative, we hold that Briggs waived any error relating to Moore's participation by failing to object at the appropriate time. *See In re First Commodity Corp. of Boston*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,694 at 33,803 (CFTC May 29, 1987)

---

<sup>33</sup> See generally *Grupo Industrial Camesa v. United States*, 853 F.Supp. 440, 443 (U.S. Court of Int'l Trade 1994) (presuming that absent commissioners properly reviewed transcripts of missed hearing prior to rendering decision in the matter); *Compare Jones v. Pillow*, 47 F.3d 251, 252 (8th Cir.1995) (presumption of proper review is only inappropriate where there is affirmative evidence indicating that a proper review was not performed); *United States v. Hamell*, 931 F.2d 466, 468 (8th Cir.), *cert. denied*, 502 U.S. 928 (1991) (presumption of proper review is supported by fact that court had available to it all necessary parts of the record).

We reject, however, the Appeals Panel's reasoning that the propriety of Moore's participation was essentially immaterial because there would have been a majority decision even if Moore's vote were disregarded. In our experience, agreement as to the ultimate result can mask significant disagreements among Panel members about fundamental issues. Consequently, evidence of such agreement, standing alone, does not support a reliable inference that a Panel member's participation in the decision-making process was superfluous or otherwise non-prejudicial.

(holding that the firm waived its objection to the absence of a panel member during a hearing by failing to move to strike the affected witness's testimony).<sup>34</sup>

Briggs also argues that NYMEX failed to meet its discovery obligations under Commission Rule 8.17(a)(2). As noted above, Compliance never produced the July 9, 1993 trade surveillance report that triggered the investigation of the trade sequences included in the complaint and did not produce the investigation report considered by the Business Conduct Committee when it issued the complaint until after the hearing. In essence, the Appeals Panel concluded that Briggs was not prejudiced by these alleged errors because Compliance had produced other documents reflecting the material information contained in the withheld documents.

Commission Rule 8.17(a)(2) requires an exchange to permit examination of all tangible evidence in its possession or control that is "relevant to [the] charges" in the exchange's complaint "in advance of the hearing." Our precedent, however, recognizes that, as a general rule, "it is unlikely that the bulk of the tangible evidence retained by an exchange would be of material aid to a respondent's preparation for or presentation of his case." *Laken v. Chicago Mercantile Exchange*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,968 at 37,534 (CFTC Dec. 7, 1990). Consequently, an exchange's failure to fully comply with its

---

<sup>34</sup> Both Briggs and his counsel were present at the third hearing session when the membership of the Adjudication Panel changed. Counsel did not object to the change at that time. Moreover, at no time during either the third or fourth hearing sessions did counsel note that Moore had missed the first two hearing sessions and object to his participation in the Adjudication Panel's deliberations. Such an objection would have put NYMEX on notice of the importance of addressing the circumstances that justified the change and taking steps to ensure that Moore's participation in the Panel's deliberations were consistent with fundamental fairness.

The record also shows that Briggs's counsel failed to raise timely objections to: (1) the commencement of the first hearing session while two of the Panel members were not present; (2) Michael Moore's alleged disqualifying financial interest; (3) the delay between the date the complaint was issued and the date the hearing commenced; (4) the delay between the second and third hearing sessions; and (5) the delay between the completion of the hearing and the Adjudication Panel Decision.

production obligation will be deemed prejudicial only if respondent shows “there is a reasonable likelihood that the withheld information would be exculpatory as to either liability or sanctions.”

*Id.*

Briggs’s showing falls well short of this standard. The record shows that Briggs was given access to a substantial number of relevant documents.<sup>35</sup> He has not even generally described the type of exculpatory information undisclosed by these documents that was likely to be included in either the July 9, 1993 trade surveillance report or the investigation report considered by the Business Conduct Committee when it issued the complaint. Because Briggs received the latter document while his appeal was pending before NYMEX, the inadequacy of his showing is particularly telling. On this record, we cannot conclude that NYMEX’s failure to either produce the July 9, 1993 trade surveillance report or make production of other documents in a timely manner prejudiced Briggs.<sup>36</sup>

---

<sup>35</sup> The record suggests that prior to or during the hearing, Briggs was permitted to examine: (1) the documents included in Exhibit 3 of the record on appeal (Tr. at 10); (2) witness interview memorandums (Tr. at 96, 142-43); (3) notes Cloughen drafted in preparing for his testimony (Tr. at 85-86, 174); and (4) the contents of Cloughen’s investigative file.

<sup>36</sup> As to the timeliness of NYMEX’s production, nothing in the record suggests that Briggs’s counsel made a prehearing request for an opportunity to examine all relevant tangible evidence in NYMEX’s possession or control. Nor does the record show that counsel objected either to the scope of Compliance’s prehearing production or to its tardy production.

Briggs’s failure to show that he was prejudiced does not diminish the significance of the series of procedural shortcomings that plagued this proceeding. Compliance with Commission standards plays an important role in maintaining public confidence in the fairness and reliability of industry self-regulation. We expect NYMEX to review its disciplinary process and take the steps necessary to ensure that errors of this kind will be reduced or eliminated.

### III.

Briggs's substantive challenges focus on NYMEX's credibility determinations and factual assessments. He contends that findings material to NYMEX's liability analysis were based on insupportable credibility determinations, hearsay and otherwise unreliable evidence.

As noted above, both the Adjudication Panel and the Appeals Panel carefully reviewed the evidentiary record in assessing liability. The Adjudication Panel found the record sufficient to support some of the complaint's allegations, but dismissed several allegations for failure of proof. The Appeals Panel did not simply rubber-stamp the Adjudication Panel's analysis. It reviewed each of the challenged sequences and commented on several of the credibility issues that the Adjudication Panel had bypassed. Indeed, based on its review, the Appeals Panel vacated one of the Adjudication Panel's liability findings as unsupported by the record.

As the Appeals Panel emphasized, the documents used by the traders who participated in the challenged trade sequences were the primary evidence in this case. Because formal rules of evidence do not apply in the context of exchange disciplinary proceedings, the hearsay objections raised by Briggs's counsel were inapposite. Moreover, NYMEX properly evaluated the documents for indicia of reliability prior to determining the weight attributable to the information they reflected. *Compare ABC Commodity Futures and Options, Inc. v. NFA*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,911 at 37,306-07 (CFTC Aug. 2, 1990) (significant weight may not be accorded hearsay that lacks indicia of reliability).

In the main, Briggs's challenges to NYMEX's factual evaluations amount to a request that we reweigh the evidence and second-guess the inferences that the exchange drew from the

trading patterns and audit irregularities evidenced by the documentary evidence.<sup>37</sup> Our precedent, however, recognizes that the traders who serve on exchange disciplinary panels have specialized experience and knowledge about customs in the trading pits that put them “in the best position to draw inferences from the evidence presented to them” and enable them to separate “the appearance of regularity from its substance.” *Clark*, ¶ 27,370 at 46,693. While we might well evaluate the evidence differently in some respects, the record shows that there is a reasonable basis for all findings material to liability and sanctions. Accordingly, we conclude that NYMEX’s findings are supported by substantial evidence.

#### IV.

Briggs’s challenges to the sanctions NYMEX imposed are also unpersuasive. Our precedent recognizes that an exchange’s choice of sanctions must be “reasoned rather than arbitrary” and reflect “the application of minimal standards of fairness to the facts and circumstances established on the record.” *Jaunich v. Minneapolis Grain Exchange*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,597 at 39,865 (CFTC Oct. 16, 1992). We have also held that the focus of every exchange disciplinary action should be deterrence of future violations by both the member who is the subject of the proceeding and other exchange members who might be tempted to undertake similar wrongdoing. *Malato*, ¶ 24,448 at 35,962.

As noted above, NYMEX concluded that Briggs’s violations were serious because non-competitive trading threatens public confidence in the market place as well as the “reputation, prospects and other best interests of the Exchange and its members.” Appeals Panel Decision at 78. NYMEX characterized Briggs’s violations as “repetitive, serious wrongdoing of a calculated

---

<sup>37</sup> For example, almost all challenged transactions where NYMEX found that Briggs knowingly participated in illegal cross trading involved a pattern of trades leading to a wash result. Many of the challenged transactions also involved audit irregularities such as indications that Briggs, and sometimes his opposite trader, did not accurately record information about the trade when it was executed.

and intentional nature,” and, in some instances, committed with “utter disregard for the welfare and rights of customers.” Appeals Panel Decision at 59. Finally, NYMEX concluded that the absence of evidence that substantial profits flowed directly from the wrongdoing did not significantly mitigate the seriousness of the violations. Appeals Panel Decision at 78.

In our view, NYMEX’s analysis is well reasoned, factually sound, and consistent with the goal of deterrence. Briggs emphasizes that the severity of his sanctions is greater than those imposed on the settling respondents. Our precedent, however, recognizes that sanctions imposed in the settlement context are rarely an appropriate guide to the choice of sanctions in an adjudicated case. *See In re Fetchenhier*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,838 at 40,745 (CFTC Aug. 13, 1993). Indeed, Briggs offers no persuasive showing that the gravity of his wrongdoing was comparable to the gravity of the wrongdoing admitted by any of the settling respondents.

Briggs also reiterates his claim that he was the victim of discriminatory treatment due to his failure to cooperate with Compliance in another case. We find that the record does not establish any reliable basis to conclude that NYMEX’s choice of sanctions was affected by any improper animus toward Briggs.<sup>38</sup>

---

<sup>38</sup> Briggs’s other challenges to NYMEX’s choice of sanctions do not warrant specific discussion. We reject them as unsupported by the record.

## **CONCLUSION**

In light of this analysis, we conclude that NYMEX's disciplinary action against Briggs was in accordance with the policies of the Act and affirm its result.

IT IS SO ORDERED.

By the Commission (Acting Chairman NEWSOME and Commissioners HOLUM, SPEARS, and ERICKSON).

---

Jean A. Webb  
Secretary to the Commission  
Commodity Futures Trading Commission

Dated: December 4, 2001